Supreme Court, U.S.
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No. 92-1503

In The

Supreme Court of the United States

October Term, 1992

KAISER ALUMINUM AND CHEMICAL CORPORATION, a Delaware Corporation,

Petitioner,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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April 15, 1993

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QUESTION PRESENTED

1. Whether this Court should review the Fourth Circuit Court of Appeal's decision that Kaiser's Complaint, which sought only economic damages for alleged tortious conduct, failed to state a claim under West Virginia law under the facts of record?

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WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania Corporation,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Westinghouse Electric Corporation, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Fourth Circuit's decision in this case, which is reported at 981 F.2d 136 (4th Cir. 1992).

STATEMENT OF THE CASE

On March 1, 1993, Kaiser Aluminum and Chemical Corporation ("Kaiser") filed its petition for writ of

certiorari seeking review and reversal of a Final Order of the Fourth Circuit Court of Appeals entered December 2, 1992 in favor of Westinghouse Electric Corporation ("Westinghouse"). Kaiser argues that both the Fourth Circuit and the district court misconstrued Kaiser's Complaint as one in strict liability, not in negligent repair. This assertion is without merit and misstates what transpired. Neither the Fourth Circuit nor the district court held that West Virginia did not recognize a cause of action for negligent repair. Instead, they opined that under the facts of this case, Kaiser's Complaint did not state a cause of action under West Virginia law and the additional materials Kaiser subsequently submitted did not satisfy the requisite standard of proof. A review of the relevant facts and law demonstrates both courts were correct.

On November 17, 1988, Kaiser, for itself and Trochus Insurance Company, its insurer, who retains a majority subrogated interest, instituted this action against Westinghouse. Kaiser sought recovery under tort law for certain alleged repair expenses and "business interruption losses" resulting from an electrical failure in a motor generator set ("M.G. set") in its aluminum mill in Ravenswood, West Virginia, on December 3, 1987 (Complaint, Petitioner's Appendix D, Tab 2).

Westinghouse filed a timely motion to dismiss ("Motion") contending that: 1) Kaiser's alleged damages were solely economic losses which were not recoverable in tort under West Virginia law; and 2) the applicable statutes of limitations barred any contract action. (Motion, Respondent's Appendix A.) Kaiser responded that West Virginia law allowed recovery of economic losses in a tort action when the plaintiff's damages

resulted from a "sudden, calamitous event" and relied on the opinions in *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854, 859 (W.Va. 1982) and *Roxalana Hills, Ltd. v. Masonite Corp.*, 627 F.Supp. 1194 (S.D.W.Va 1986), *aff'd*, 813 F.2d 1228 (4th Cir. 1987). At no time prior to the district court's ruling on the Motion did Kaiser dispute that it was required to meet the test set forth in *Star Furniture* and *Roxalana Hills*.

Chief Judge Haden was the district judge assigned to this case and the *Roxalana Hills* case. On October 12, 1989, Chief Judge Haden granted Westinghouse's Motion holding that the Complaint failed to meet the requirements of *Star Furniture* or *Roxalana Hills*. (District court Opinion, Petitioner's Appendix A, Tab 1.)

Kaiser then moved for reconsideration of the district court's Order pursuant to Federal Rules of Civil Procedure 52(b) and 59(e). Kaiser argued *for the first time* that the test set out in *Star Furniture*, regarding strict liability actions and applied to negligence actions as well in *Roxalana Hills*, was not applicable to Kaiser's negligent repair claim. (Motion to Vacate or Amend, Petitioner's Appendix D, Tab 1.) Kaiser submitted excerpts it claimed were sufficient to meet the requirements of *Star Furniture*. (Motion to Vacate or Amend, Petitioner's Appendix D, Tabs 3-8.) At no time did Kaiser move to amend its Complaint.

Chief Judge Haden considered Kaiser's shift in position and supplemental materials and denied Kaiser's motions. (District court Order, Petitioner's Appendix A, Tab 2.) On November 20, 1990, Kaiser appealed the district court's decision to the Fourth Circuit Court of

Appeals. On December 2, 1992, a three-judge division of the Fourth Circuit affirmed the ruling of the district court. (Circuit Court Decision, Petitioner's Appendix A, Tab 3.) Kaiser then filed a motion for rehearing *en banc* which was denied on January 7, 1993. (Circuit Court Order, Petitioner's Appendix C.) Pursuant to § 28 U.S.C. 1254(1) (1966), Kaiser now seeks certiorari review.

RELEVANT FACTS

This is a diversity action involving the manufacture, sale and repair of an industrial product between two large sophisticated entities, Westinghouse as manufacturer/vendor and Kaiser, as end-user/purchaser. In 1976, Kaiser ordered and purchased from Westinghouse a motor generator stator ("new stator") and rotor ("new rotor") for use as replacement parts for its 168 inch aluminum mill at Ravenswood, West Virginia. Westinghouse manufactured the new stator and new rotor and delivered them to the Kaiser Aluminum facility at Ravenswood in February of 1979. (Complaint ¶¶ 8 and 9, Petitioner's Appendix D, Tab 2.) Westinghouse warranted that the new stator and new rotor would be free from defects in workmanship and materials for one year after the date of initial operation, not to exceed 18 months after shipment.

Kaiser did not place either component into the aluminum mill upon receipt, but instead placed both into storage where they stayed for 27 months until April 20, 1981. (Petitioner's Brief at 7.) On April 26, 1981, Kaiser installed the new stator and new rotor. (*Id.*) On April 27,

1981, while shutting down the M.G. set for other reasons, Kaiser personnel noticed the new rotor was rubbing on the end-bell housing of the new stator. (Petitioner's Brief at 7.) Ultimately, Kaiser determined that the core of the new rotor had slipped on the shaft, which necessitated mechanical repairs. (*Id.*) Although the warranty on the new rotor had expired, Westinghouse agreed to perform mechanical repairs on the new rotor at its Round Rock, Texas, facility at no cost to Kaiser. Westinghouse performed the repairs in May of 1981 and returned the new rotor to Kaiser in early June of 1981. (Petitioner's Brief at 8.) Again, Kaiser did not place the new rotor into the M.G. set, but instead returned it to storage for another six and a half years, until November 29, 1987, when a fire in the M.G. set destroyed the original rotor. (Petitioner's Brief at 9.)

On December 3, 1987, Kaiser installed the new rotor which failed electrically when energized. (*Id.*) Kaiser claims the failure left the mill inoperable for approximately ten days. (*Id.*). This suit followed. Essentially, Kaiser alleges that Westinghouse's negligent repairs of the new rotor in May of 1981, caused the electrical failure in December, 1987. The Complaint did not contain any contract-based causes of action. Kaiser did not and could not allege that the electrical failure caused any personal injury or physical damage to any part of the mill or M.G. set other than to a portion of the new rotor.

REASONS FOR DENYING THE WRIT

I. THE PETITION FAILS TO MEET ANY OF THE CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

Rule 10 of the Rules of the Supreme Court of the United States sets forth the considerations governing jurisdiction of a Writ of Certiorari. The Rule provides that review is not a matter of right, but will be granted by judicial discretion only when there are "special and important reasons therefor." Rule 10(a) lists three considerations which, while neither controlling nor all inclusive, are weighed by the Court in deciding whether to grant a writ from a federal appellate court. They are:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * *

Kaiser alleges the district court's grant and the Fourth Circuit's affirmance of Westinghouse's Motion is such a departure from the law of West Virginia and the rulings of this Court to require review and reversal. This contention is baseless and without merit. Kaiser's Petition does not meet any of these criteria because: 1) there is no conflict between the circuits; 2) there is no federal

question involved; and 3) there is no substantial departure from the accepted and usual course of judicial proceedings. This action involves only the routine interpretation of West Virginia law concerning the sale and repair of a product. District courts and courts of appeal all over this country conduct similar tasks daily in diversity matters. While this Court does not often state the reason why writs of certiorari are granted or denied, counsel for Westinghouse could not find a case where this Court granted a writ of certiorari on the same grounds asserted by Kaiser.

Further, this Court disfavors reviewing lower court decisions which turn solely upon an analysis of the particular facts involved. See *Texas v. Mead*, 465 U.S. 1041 (1984) and *United States v. Johnston*, 268 U.S. 220, 227 (1925); ("We do not grant a certiorari to review evidence and discuss specific facts.") Moreover, where two courts have agreed upon the facts and their significance, this Court will not review the matter "in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271 (1949). No such error exists here and certiorari is not warranted.

II. THE FOURTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF KAISER'S COMPLAINT BECAUSE IT FAILS TO STATE A CLAIM UNDER WEST VIRGINIA LAW.

A. West Virginia Law Does Not Support Kaiser's Tort Claim For Solely Economic Losses.

The Petition seeks this Court's review of an alleged tort claim under West Virginia law. West Virginia law is

clear – purely economic losses are recoverable only in contract, not in tort. As the West Virginia Supreme Court has noted:

> . . . *a party who suffers mere economic loss* as a result of a defective product must turn to the Uniform Commercial Code to seek relief.

Basham v. General Shale, 377 S.E.2d 830 (W.Va. 1989) (emphasis added). This holding, first enunciated in *Star Furniture*, has been consistently followed by courts applying West Virginia law, *see, e.g., Capitol Fuels, Inc. v. Clark Equipment Co.*, 382 S.E.2d 311 (W.Va. 1989); *Roxalana Hills*, 627 F.Supp. at 1196, and is in accord with the overwhelming weight of authority. *See Jones and Laughlin Steel Corporation v. Johns-Manville Sales Corporation*, 626 F.2d 280, 284 (3rd Cir. 1980); *Purvis v. Consolidated Energy Products*, 674 F.2d 217, 222-224 (4th Cir. 1982); *Hart Engineering Company v. FMC Corporation*, 593 F.Supp. 1471 (D.R.I. 1984). No West Virginia case involving a product since *Star Furniture* has held otherwise.

The reasons behind this rule are sound. As the court noted in *Roxalana Hills*, disallowing a cause of action for economic losses in tort maintains the proper relationship between the law of torts and the contract law principles set forth in the Uniform Commercial Code. (*Id.*) at 1196. Tort theories are intended to protect consumers from products which are not reasonably safe, not from those products which are merely ineffective. (*Id.*) The proper relationship between tort law and the Uniform Commercial Code requires that claims for economic damages based upon unfulfilled expectations must be pursued under a warranty or contract theory. *Star Furniture*, at 859 and *Roxalana Hills*, at 1196.

The focus of the Petition is the alleged erroneous characterization by the Fourth Circuit (twice), the district court (twice) and Westinghouse (continuously) of Kaiser's cause of action. Kaiser argues this is not a strict liability tort suit, but rather a negligent repair suit to which different law and standards apply. (Petition at 13, 20-23.) This argument is disingenuous and in direct conflict with Kaiser's evidence and actions below.

First, all parties, including Kaiser, initially agreed this action was governed by the law set forth in *Star Furniture* and *Roxalana Hills*. Specifically, Kaiser cited *Star Furniture* in its Response to Westinghouse's Motion and stated: "West Virginia law does distinguish between tort and contract claims when damages occur to the defective product itself. However, West Virginia tort law does provide a remedy when a sudden, calamitous event causes physical damage to the product." The Response then spent four pages arguing how and why Kaiser's Complaint met the *Star Furniture* test.

Further, Kaiser also initially conceded that under the holding in *Roxalana Hills v. Masonite Corp.*, 627 F.Supp. 1194 (S.D. W.Va), aff'd. 813 F.2d 1228 (4th Cir. 1987) " . . . the West Virginia Supreme Court of Appeals would analyze *negligence* claims involving damage to products by the same test articulated in *Star Furniture* for strict liability claims.

Relying upon Kaiser's arguments at that time, the district court properly summarized Kaiser's position as follows:

> Perhaps recognizing that it can recover, if at all, in tort only under the principles set forth in

> *Star Furniture*, Kaiser's position is stated as follows: As a result of Westinghouse's negligent repair, the rotor/shaft component "suffered a sudden, immediate and massive electrical failure" when energized which resulted in physical damage to the rotor itself and the motor-generator set and in loss of profits during the period of time the hot mill was not operational, Plaintiff's memorandum at 4. The Plaintiff has not alleged, however, that the electrical failure was attributable to any inherently dangerous defect or design of the rotor/shaft component.

(District court Order Petitioner's Appendix A, Tab 1, pg. 4.) Based on this deficiency, the district court granted Westinghouse's Motion.

Kaiser then filed a Motion to Vacate or Amend Judgment Order. (Petitioner's Appendix D, Tab 1.) It was at this time and only after the district court granted Westinghouse's Motion that Kaiser argued *for the first time that Star Furniture did not apply and that negligence actions should be viewed differently than strict liability actions*. Neither the district court nor the Fourth Circuit were misled by this sleight of hand. This Court should not be misled by Kaiser's change of position either. Under West Virginia law, only a contract action provides a remedy for economic losses including lost profits for damage to a product. However, Kaiser conceded that any contract claim which it may have had is barred by the statute of limitations. West Virginia Code § 46-2-725 (1966). (Respondent's Appendix B.)

Kaiser then attempted to argue that this is simply a negligent repair case for which lost profits may be recovered. This is folly. First, the cases Kaiser cited below

support Westinghouse's position because they sound in contract for breach of warranty, not in negligent repair. *See Skeen v. C & G Corp.*, 185 S.E.2d 493 (W.Va. 1971) and *Elsey Ford Sales, Inc. v. Solomon*, 280 S.E.2d 718 (W.Va. 1981). Second, there is no authority that lost profits may be recovered in any context remotely similar to this action. Third, as the Fourth Circuit succinctly pointed out in its Opinion:

> The suit here arises from a sale to a customer-purchaser by a manufacturer of an article to be manufactured pursuant to certain requirements. Such a product not infrequently has breakdowns in the early period of use. The manufacturer in such a case must make repairs or corrections in the product in conformity with its implied warranty of merchantability and of good workmanship. These repairs or corrections are not separate from the sale of the article, they are merely steps taken to conform the product to the expected performance requirements of the product purchased. As such, they are an integral part of the manufacturer's bargained-for performance of supplying a sound product per the purchase agreement. And this is why Westinghouse made no charge and filed no bill for the repairs and corrections made in 1981 and why Kaiser paid nothing for such repairs. Moreover, Kaiser's cause of action depends ultimately on establishing that the product, either from date of delivery or from the date of the correction in 1981, was a "defective product" to which was to be attributed the "event" in 1988. Thus, Kaiser's case is one which presents all the necessary elements of a products liability case.

(Circuit Court Decision, Petitioner's Appendix A, Tab 3, pg. 9.)

Moreover, even if the Fourth Circuit treated Kaiser's Complaint only as a negligence action rather than as a strict liability action, lost profits could not be recovered. For as Kaiser initially conceded, West Virginia law in negligence cases involving a product is the same as strict liability cases for purposes of analyzing liability and damages. Specifically, under *Roxalana Hills*, "West Virginia would *not* find a negligence cause of action in a breach of contract case. . . . *The Court concludes the same bargain and expectation interests apply to negligent breaches of contract*" (emphasis added) *Roxalana Hills*, at 1198. The West Virginia Supreme Court of Appeals has on at least two occasions cited *Roxalana Hills* with approval. *See, Capitol Fuels, Inc. v. Clark Equipment Co.*, 382 S.E.2d 311 (W.Va. 1989) and *Basham v. General Shale*, 377 S.E.2d 830 (W.Va. 1988).

Further, the Fourth Circuit correctly noted by reference to the Third Circuit case of *Jones & Laughlin Steel v. Johns-Manville Sales*, 626 F.2d 280 (3rd Cir. 1980) that:

> "Economic loss[es]" are "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits without any claim of personal injury or damage to other property . . . The line of demarcation between physical harm and economic loss . . . reflects the line of demarcation between tort theory and contract theory." *Jones & Laughlin Steel v. Johns-Manville Sales*, 626 F.2d 280 (3rd Cir. 1980) (citation omitted).

(Footnote 2 of Circuit Court Decision, Petitioner's Appendix A, Tab 3, pg. 5.) *Star Furniture, Roxalana Hills, Capitol Fuels* and *Basham* are all in accord.

Finally, at *no time* did the district court or the Fourth Circuit opine that West Virginia did not recognize a tort action for negligent repair. Rather, each court consistently found that based on the facts of this case and the relief sought, Kaiser's Complaint must be dismissed because it was barred by the contract statute of limitations and Kaiser could not meet the tort standard of proof.

B. The Court Correctly Analyzed The Supplemental Materials Supplied By Kaiser In Support Of Its Motion To Vacate Or Amend Judgment Order.

The Fourth Circuit properly noted that affidavits and exhibits not before the lower court in making its decision are not to be considered on appeal. *Gilson v. Republic of Ireland*, 787 F.2d 655, 659 (D.C. Cir. 1986); *United States v. Drefke*, 707 F.2d 978, 983 (8th Cir.), cert. denied, 464 U.S. 942 (1983); *Munoz v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators*, 563 F.2d 205, 209 (5th Cir. 1977). (Circuit Court Decision, Petitioner's Appendix A, Tab 3, pg. 6.)

However, while not required to do so, the Fourth Circuit conducted an extensive review of the supplemental materials supplied by Kaiser. This, in effect, transformed Westinghouse's Motion to one under Rule 56. The court concluded that: 1) Kaiser's submission conceded strict liability principles applied; 2) no defect existed; and 3) no sudden, calamitous event had occurred. (Circuit

Court Decision, Petitioner's Appendix A, Tab 3, pgs. 17-19.) On this last point, the Fourth Circuit correctly noted that the total event lasted 2-3 seconds and only a small amount of electricity escaped. Further, no one was injured or in danger of injury. The event was not unusual or unexpected and the M.G. set shut itself down as designed immediately when the failure occurred. Finally, only a small portion of the rotor was damaged and no other property was affected.

Kaiser's suggestion that the material was filed to preempt a summary judgment motion is hollow, especially when one considers that Kaiser filed these materials *after* the District Court had granted Westinghouse's Motion to Dismiss. Further, Kaiser's delay in presenting these materials is unexplained and without justification. Finally, the materials had relevance, if at all, only in a strict liability context to attempt to prove: 1) the product was not reasonably safe for its intended use; and 2) that the damage resulted from a sudden, calamitous event. Simply stated, these materials confirm that Kaiser sought and failed to satisfy the requirements of *Star Furniture* and its progeny.

Finally, dismissal was also appropriate because Kaiser's negligence claims are barred by the applicable negligence statute of limitations. West Virginia Code § 55-2-12(a) (1981 Repl. Vol.) provides for a two year statute of limitations for all negligence actions for damage to property. (Respondent's Appendix C.) The repair of which Kaiser complains occurred in late April and early May of 1981. This is the last time Westinghouse saw or had anything to do with the product. Kaiser filed its lawsuit in November of 1989, 8½ years after the repair

and 6½ years after the negligence statute of limitations expired. Westinghouse raised in its Answer to the Complaint, as a separate defense, all statutes of limitations. Thus, under every reasonable analysis, Kaiser's Complaint fails and was properly dismissed. (Answer, Respondent's Appendix D, App. 14, "THIRD DEFENSE.")

C. The Fourth Circuit's Affirmance Of The Dismissal Is Not Violative Of This Court's Rulings Regarding Rules 12(b)(6) Or 8.

Kaiser alleges that the Fourth Circuit's decision to affirm the dismissal of this action is contrary to this Court's cases which hold that Complaints should not be dismissed for failure to state a claim upon which relief can be granted unless it appears that no set of facts in support of the claim would entitle the claimant to the relief sought. *Scheuer v. Rhodes*, 94 S.Ct. 1683, *Conely v. Gibson*, 78 S.Ct. 99 (1957), *Hishon v. King & Spalding*, 104 S.Ct. 2229 (1984) and *McLain v. Real Estate Bd., Inc.*, 100 S.Ct. 502 (1980).

Review of the record does not support this claim. The Fourth Circuit's opinion is extensive and exhaustive, comprising over twenty (20) pages. The Court conducted a *de novo* review of the evidence and concluded the district court was correct. The Fourth Circuit was called upon to address an issue of West Virginia tort law, one that West Virginia courts have previously addressed. It's only because Kaiser is unhappy with the Fourth Circuit's answer that Kaiser seeks to argue that the court misunderstood Kaiser's question. This Court should not be

misled or used as a forum to review routine state law tort and breach of contract claims. Both the district court and the Fourth Circuit are empowered to address these issues and did so correctly. To suggest otherwise would emasculate Rules 12(b) 6 and 8.

Additionally, there is ample support for the district court's refusal to vacate its Order dismissing the case and the Fourth Circuit's affirmance. Fourth Circuit case law holds that absent a "miscarriage of justice", a party cannot urge "new theories" for the first time on appeal. *Karpa v. Commissioner*, 909 F.2d 784, 788-89 (4th Cir. 1990); *National Wildlife Fed'n v. Hanson*, 859 F.2d 313, 318 (4th Cir. 1988). Moreover, courts of appeals cannot apply different theories than those advanced below. *See Richardson v. Turner*, 716 F.2d 1059, 1061 n.2 (4th Cir. 1983) (court of appeals should not decide case on legal theory contrary to one advanced below); *United Virginia Bank v. B.F. Saul Real Estate Trust*, 641 F.2d 185, 189 (4th Cir. 1981) (court of appeals would not allow parties to "pla[y] fast and loose" or "blo[w] hot and cold" by changing positions on appeal).

West Virginia law does not recognize or support the distinction Kaiser seeks to make. This is a breach of contract action arising out of the sale and repair of a product. West Virginia law does not recognize tort recovery of economic losses absent a sudden, calamitous event. Both the district court and Fourth Circuit properly found no sudden, calamitous event occurred and dismissed the Complaint.

D. The Fourth Circuit's Affirmance Did Not Violate Kaiser's First Amendment Rights.

Kaiser alleges that the Fourth Circuit's affirmance of the district court's dismissal violates Kaiser's First Amendment right to petition for redress. While citing no authority remotely analogous to this case, Kaiser argues that the courts below changed the nature and scope of Kaiser's Complaint and failed to permit Kaiser to pursue its stated cause of action. Nothing could be further from the truth. First, Kaiser has had *every* opportunity conceivable to state a viable cause of action under West Virginia law *given the facts of this case, but failed to do so.* This Court should not be confused: Neither the district court nor the Fourth Circuit ever ruled that West Virginia does not recognize a cause of action for negligent repair. To the contrary, both tribunals recognized the cause of action. However, under the facts of this case, both concluded that Kaiser's Complaint and evidence demonstrated only a breach of contract claim, which was barred by the applicable statute of limitation. Kaiser did not and could not demonstrate a tort claim arising from a sudden, calamitous event. Further, even after the district court dismissed Kaiser's Complaint, Kaiser never moved in district court to file an amended Complaint. The appropriate result of these failures under West Virginia law is dismissal. Accordingly, Kaiser has not been denied any First Amendment or other constitutional right.

CONCLUSION

Kaiser has tried four (4) times unsuccessfully to convince a Court that its alleged negligent repair claim is viable under West Virginia law where it suffered only economic losses and no sudden, calamitous event occurred. The district court and the Fourth Circuit correctly applied the facts in this case to existing West Virginia law and concluded Westinghouse's Motion to Dismiss was proper. This Court should so find.

Respectfully submitted,

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April 15, 1993

APPENDIX

APPENDIX A:

DEFENDANT WESTINGHOUSE ELECTRIC CORPORATION'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS.....App. 1

APPENDIX B:

WEST VIRGINIA CODE § 46-2-725 (1966).....App. 10

APPENDIX C:

WEST VIRGINIA CODE § 55-2-12a 1981 REPLACEMENT VOLUME.....App. 11

APPENDIX D:

ANSWER OF WESTINGHOUSE ELECTRIC CORPORATION.....App. 12

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT PARKERSBURG

KAISER ALUMINUM & CHEMICAL CORPORATION, a Delaware corporation,

Plaintiff,

v. CIVIL ACTION NO. A:88-15112

WESTINGHOUSE ELECTRIC CORPORATION, A Pennsylvania corporation,

Defendant

DEFENDANT WESTINGHOUSE ELECTRIC CORPORATION'S MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and this Court's Time frame Order of January 20, 1989, defendant Westinghouse Electric Corporation ("Westinghouse"), by its counsel, Shawn P. George and Robert L. Stewart, Jr., moves the court for an Order dismissing the Complaint for failure to state a claim upon which relief can be granted. This motion is made on the following grounds:

1. Plaintiff's claim for cost of repairs, and "business interruption losses" is solely for economic losses, and is based solely on a theory of "negligent repair";

2. There is no tort cause of action for the recovery of economic losses under the law of the State of West Virginia; and

3. Plaintiff's Complaint is barred by the applicable statute of limitations.

WHEREFORE, Westinghouse demands that the Court dismiss the Complaint with prejudice and grant Westinghouse its costs and attorney's fees incurred.

WESTINGHOUSE ELECTRIC CORPORATION,

By Counsel

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT PARKERSBURG

KAISER ALUMINUM & CHEMICAL CORPORATION, a Delaware corporation,

Plaintiff,

v. CIVIL ACTION NO. A:88-1512

WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania corporation,

Defendant

DEFENDANT WESTINGHOUSE ELECTRIC CORPORATION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

I. INTRODUCTION

In 1976, Kaiser Aluminum and Chemical Corporation ("Kaiser") ordered and purchased from Westinghouse Electric Corporation ("Westinghouse") a motor generator stator component ("new stator") and a motor generator rotor component ("new rotor") for use in its aluminum mill at Ravenswood, West Virginia. Westinghouse manufactured the new stator and new rotor and delivered them to the Kaiser Aluminum facility at Ravenswood in February of 1979. Westinghouse warranted that the new stator and rotor would be free from defects in workmanship or materials for one year after date of initial operation, not to exceed 18 months after shipment.

Kaiser placed the new stator and new rotor into storage until April 20, 1981. On April 26, 1981, Kaiser installed the new stator and new rotor in the motor generator set ("M.G. set") of Kaiser's 168 inch hot mill. On April 27, 1981, while shutting down the M.G. set for other reasons, Kaiser noticed a rubbing of the new rotor on an end-bell housing of the new stator. Ultimately, Kaiser determined that the core of the new rotor had slipped on the shaft, which necessitated mechanical repairs. Westinghouse agreed to repair the new rotor at its Round Rock, Texas, facility, which repairs Westinghouse performed in May of 1981. Thereafter, Westinghouse returned the new rotor to Kaiser. Kaiser placed the new rotor into storage for six and a half years, until November 29, 1987, when a fire in the M.G. set destroyed

the original rotor. From April 27, 1981, until November 29, 1987, Kaiser operated the M.G. set with the original rotor and new stator.

On December 3, 1987, Kaiser alleges it placed the new rotor and original stator into the M.G. set, which failed immediately when energized. Kaiser claims that this electrical failure of the new rotor left the mill inoperable for approximately ten days.

Kaiser instituted this action on November 17, 1988, and alleged that Westinghouse's negligent repairs of the new rotor in May of 1981, caused the electrical failure in December, 1987. Kaiser claims it incurred repairs expenses, and "business interruption losses" in excess of one million dollars as a result of the failure. Kaiser does not allege that the electrical failure caused any physical damage to any part of the mill or M.G. set other than the new rotor and new stator.

This memorandum will establish conclusively that the damages which Kaiser seeks are all "economic losses", which are not recoverable in a tort action under West Virginia law. Accordingly, the Compliant, which is based solely upon a theory of negligent repair, must therefore be dismissed. Alternatively, the Complaint is also barred by the applicable statute of limitations, W. Va. Code § 46-2-725 (1964).

II. ARGUMENT

A. West Virginia law does not permit the recovery of economic losses in a tort cause of action.

The only damages Kaiser seeks for Westinghouse's alleged negligent repair of the new rotor are the cost of repair of the rotor, and "business interruption losses" alleged to have been caused by the loss of the use of the rotor. These alleged damages are all economic losses. *Star Furniture Company v. Pulaski Furniture Company,* 297 S.E.2d 854, 857 (W. Va. 1982); *Jones and Laughlin Steel Corporation v. Johns-Manville Sales Corporation,* 626 F.2d 280, 284 (3rd Cir. 1980). The overwhelming weight of authority holds that economic losses are not recoverable in tort. *See, e.g., Star Furniture, supra* at 859; *Jones and Laughlin, supra,* at 287; *Purvis v. Consolidated Energy Products,* 674 F.2d 217, 222-223 (4th Cir. 1982); *Roxalana Hills, Ltd., v. Masonite Corporation,* 627 F.Supp. 1194 (S.D.W. Va. 1986). [sic] *aff'd* 813 F.2d 1228 (1987); *Hart Engineering Company v. FMC Corporation,* 593 F.Supp. 1471 (D.R.I. 1984).

As Stated by the 3rd Circuit:

> . . . where there is no accident, and no physical damage, and the only loss is a pecuniary one, through loss of the value or use of the things sold, or the cost of repairing it, the courts have adhered to the rule . . . that purely economic interests are not entitled to protection against mere negligence, and so have denied the recovery.

Jones and Laughlin, supra, at 287 (quoting W. Prosser, Law of Torts §101).

As this Court has recently held in *Roxalana Hills, supra,* disallowing a cause of action for economic losses in tort maintains the proper relationship between tort law and contract law, as set forth in the Uniform Commercial Code. Tort theories, such as strict liability and negligence, are intended to protect consumers from products which are unreasonably unsafe, not from those products which are merely ineffective. *Roxalana Hills, supra,* at 1196. The proper relationship between tort law and the Uniform Commercial Code requires that loss profit claims, such as Kaiser's, be pursued under a warranty of contract theory. *Star Furniture Company, supra,* at 859; *Roxalana Hills, supra,* at 1196.

The foregoing cases make it clear that there can be no cause of action for economic losses based on an allegation of negligent repairs. In fact, in *Jones and Laughlin, supra,* plaintiff sought, *inter alia,* to recover the costs of repairs to a roof which had been sold by the defendant Johns-Manville to the plaintiff, under a theory of negligent performance of an undertaking to render services. The Third Circuit in *Jones and Laughlin* disallowed all of the plaintiff's tort theories, including the negligent repair theory, reasoning that:

> Disallowance of tort claims for economic losses accords with the provision of the Restatement (Second) of Torts that discuss a manufacturer's liability for negligence and for strict liability. Section 323 of the Restatement (Second) for example, which defines the liability of one who negligently performs an undertaking to render services, provides that a manufacturer is liable to persons using its products for physical harm caused by its negligence. Neither the rule

> nor its accompanying commentary and illustrations extends liability for negligence to encompass economic losses.

Jones and Laughlin Steel, 626 F.2d at 287-288, quoted by this Court in *Roxalana Hills*, 627 F. Supp. at 1198. See also, *Long v. Jim Letts Oldsmobile, Inc.*, 135 Ga. App. 293, 217 S.E.2d 602 (1975). (Summary judgment granted in favor of defendant on plaintiff's claim that defendant negligently repaired plaintiff's car, where only damages were to the car itself).

There is no doubt that West Virginia law does not allow a cause of action for economic losses based on negligent repair. As this Court has properly recognized, the same rationale expressed by the West Virginia Supreme Court in *Star Furniture Company, supra,* which precludes recovery for economic losses under a strict liability theory, also prohibits a negligence cause of action for these damages. *Roxalana Hills,* at 1198. *See also, Hart Engineering Company v. FMC Corporation, supra,* at 1483. Consequently, Kaiser's claim, which is for alleged economic losses only, and based solely on allegations of negligence, must be dismissed.

B. Plaintiff's claim is barred by the applicable statute of limitations.

As the cases cited in the previous section hold, where economic losses result from product ineffectiveness, the Uniform Commercial Code controls. *Roxalana Hills, supra,* at 1196, *Star Furniture Company, supra,* at 859. Therefore, West Virginia's codification of the Uniform Commercial Code warranty statute of limitations § 46-2-725 controls

this action and provides that warranty action must be brought within four years from tender of delivery of the goods, (unless the warranty explicitly extends to the future performance of the goods, a condition which is not applicable here). W. Va. Code § 46-2-725 (1964). Assuming *arguendo,* that Westinghouse breached its contract with Kaiser in repairing the new rotor in May of 1981, this cause of action accrued *at that time, regardless of Kaiser's lack of knowledge of the breach,* and expired in May of 1985. W. Va. Code § 46-2-725(2) (1964). Kaiser instituted this action in November of 1988, three and a half years after the statute of limitations expired. Thus, this action is untimely and should be dismissed.

III. CONCLUSION

West Virginia law does not permit the recovery in tort of economic losses like those which Kaiser seeks. To allow Kaiser's claim would vitiate the warranty provisions of the Uniform Commercial Code. Consequently, the Compliant should be dismissed as failing to state a claim upon which relief can be granted. Even if West Virginia recognized the cause of action which Kaiser asserts, that action would be governed by the four-year warranty statute of limitations set forth in the Uniform Commercial Code. The Complaint, having been filed more than four years after tender of deliver of the goods and the alleged negligent conduct, is therefore barred under the applicable statute of limitations, and should be dismissed with prejudice.

WESTINGHOUSE ELECTRIC
CORPORATION,

By Counsel

/s/ Shawn P. George
SHAWN P. GEORGE
ROBERT L. STEWART, JR.
JACKSON & KELLY
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CERTIFICATE OF SERVICE

I, Shawn P. George, one of the attorneys for the defendant herein, do hereby certify that I have served the within DEFENDANT WESTINGHOUSE ELECTRIC CORPORATION'S MOTION TO DISMISS and DEFENDANT WESTINGHOUSE ELECTRIC CORPORATION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS on the plaintiff by depositing true and exact copies thereof in the United States Mail, postage paid, addressed to the plaintiff's counsel at the address listed below on the 18th day of April, 1989:

Richard L. Gill, Esquire
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Minneapolis, MN 55402-3394

Thomas V. Flaherty, Esquire
KAY, CASTO & CHANEY
Post Office Box 2031
Charleston, West Virginia 25327

/s/ Shawn P. George
SHAWN P. GEORGE

APPENDIX B

§ 46-2-725. Statute of limitations in contracts for sale.

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this chapter becomes effective [July 1, 1964]. (1963, c. 193.)

APPENDIX C

§ 55-2-12(a). Personal actions not otherwise provided for.

Every personal action for which no limitations is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative. (Code 1849, c. 149, § 11; Code 1860, c. 149 § 11; Code 1868, c. 104, § 12; 1882, c. 102, § 12; Code 1923, c. 104, § 12; 1949, c. 2; 1959, c. 2.)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT PARKERSBURG

KAISER ALUMINUM &
CHEMICAL CORPORATION,
a Delaware corporation,

Plaintiff,

v. Civil Action No. A:88-1512

WESTINGHOUSE ELECTRIC
CORPORATION,
a Pennsylvania corporation,

Defendant.

ANSWER

Defendant, Westinghouse Electric Corporation, a corporation ("Westinghouse"), by counsel, answers the Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a cause of action against Westinghouse upon which relief may be granted.

SECOND DEFENSE

1. Westinghouse is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 1, 3 and 4 of the Complaint and demands strict proof thereof.

2. Westinghouse admits the allegations in paragraphs 2, 5, 6 and 7 of the Complaint.

3. Westinghouse admits that portion of paragraph 8 of the Complaint which alleges that plaintiff purchased from Westinghouse a stator component and a rotor/shaft component. Westinghouse denies the remaining allegations of paragraph 8 of the Complaint.

4. Westinghouse admits that portion of paragraph 9 of the Complaint which alleges that Westinghouse delivered a stator (serial #S.O.88P636) and a rotor/shaft (serial #S.O.88P637) to plaintiff in 1979 pursuant to plaintiff's order of 1976. Westinghouse is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 9 of the Complaint and demands strict proof thereof.

5. Westinghouse admits the allegations in paragraph 10 of the Complaint.

6. Westinghouse admits that portion of paragraph 11 of the Complaint which alleges that plaintiff experienced problems on or about April 27, 1981, with the motor generator set. However, Westinghouse denies that the stator or rotor/shaft caused the problems or were responsible for the "malfunction".

7. Westinghouse admits that in May of 1981 it obtained the rotor/shaft component and repaired it at its facility in Round Rock, Texas. Westinghouse denies the remaining allegations in paragraph 12 of the Complaint.

8. Westinghouse denies the allegations in paragraphs 12, 14, and 15 of the Complaint.

9. Westinghouse is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 16, 17 and 19 of the Complaint and demands strict proof thereof.

10. Westinghouse denies the allegations in paragraphs 18 and 20 of the Complaint and specifically denies that it is liable to plaintiff for any sum, plus interest, costs and expenses.

11. Westinghouse denies each and every allegation of the Complaint not herein specifically admitted.

THIRD DEFENSE.

This action is barred by the applicable statutes of limitations.

FOURTH DEFENSE

The incident and damages, if any, of which plaintiff complains are barred or limited by the doctrines of contributory negligence, comparative negligence and assumption of the risk.

FIFTH DEFENSE

The incident and damages, if any, of which plaintiff complains were caused by an act or failure to act by persons, firms or corporations other than Westinghouse, which bars plaintiff's recovery against Westinghouse.

SIXTH DEFENSE

This action is barred by plaintiff's alteration, misuse, abuse, abnormal use or other handling of the motor generator set and/or its component parts which bars plaintiff's recovery against Westinghouse.

SEVENTH DEFENSE

Plaintiff's damages, if any, are barred or limited by plaintiff's failure to mitigate.

EIGHTH DEFENSE

In the alternative, Westinghouse avers that the purchase and sale of the stator component and rotor/shaft component are governed by the provisions of the Uniform Commercial Code, as enacted in the Code of West Virginia in Chapter 46-2-101 *et seq.* As such, Westinghouse asserts each and every defense available to it under the Code and the common law of West Virginia.

NINTH DEFENSE

Westinghouse asserts each and every affirmative defense available to it under Rule 8(c) of the Federal Rules of Civil Procedure, including, but not limited to: accord and satisfaction, estoppel, failure of consideration, laches, the statute of frauds and waiver.

TENTH DEFENSE

Westinghouse avers, that pursuant to Rules 9(a), 17 and 19 of the Federal Rules of Civil Procedure, that

plaintiff is not the real party in interest in this action and lacks the capacity to prosecute it, which may only be remedied by the addition or substitution of the real party in interest, which Westinghouse believes is plaintiff's insurer.

WHEREFORE, Westinghouse prays that the Court dismiss the Complaint and grant Westinghouse its costs incurred.

WESTINGHOUSE ELECTRIC CORPORATION
a Pennsylvania corporation

By Counsel

/s/ Shawn P. George
ROBERT L. ELKINS
SHAWN P. GEORGE
JACKSON & KELLY
1600 Laidley Tower
P.O. Box 553
Charleston, West Virginia 25322

CERTIFICATE OF SERVICE

I, Shawn P. George, one of the attorneys for the defendant, Westinghouse Electric Corporation, a Pennsylvania corporation, certify that I have served the Answer of Westinghouse Electric Corporation upon all counsel of record by forwarding a true and exact copy thereof to them in properly stamped and addressed envelopes deposited in the regular course of the United States mail this 17th day of January, 1989, as follows:

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